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IN THE SUPREME COURT OF FLORIDA

TERRY JEROME ROCK,

Petitioner,

v.

CASE NO.: 82,530

STATE OF FLORIDA,

Respondent.

BRIEF OF AMICUS CURIAE -- THE FLORIDA ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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PRELIMINARY STATEMENT

In this brief, the Petitioner, TERRY JEROME ROCK, will be referred to as "MR. ROCK" or "TERRY ROCK". The Respondent, State of Florida, will be referred to as the "government" or the "prosecution."

STATEMENT OF THE CASE AND FACTS

The Florida Association of Criminal Defense Lawyers (FACDL) will defer to and rely upon Mr. Rock's statement of the case and facts. The FACDL will confine its arguments to the legality and constitutionality of the process known as serial voir dire, rather than emphasizing the point of law elaborated on by Mr. Rock, specifically the conflict that arises when one law firm (i.e. Office of Public Defender) represents more than one client in the consolidated serial voir dire process.

SUMMARY OF ARGUMENT

No procedural or statutory authority exists for the implementation of the process known as "**serial voir dire.**" Rules of procedure, like statutes, must be strictly construed and fundamental rules of construction must be employed to determine if this process is authorized under law. Not only does serial voir dire violate Fla.R.Cr.P. 3.151 (improper consolidation), **but** Fla.R.Cr.P. 3.300 (controlling voir dire provision) does not provide any mechanism or basis for compelling the accused to participate in this inherently suspect and prejudicial process. Although the facial purpose behind the judicial imposition of

serial voir dire, is the "speedy disposition of cases," - - the net result will be to create an **appellate log jam of** cases premised upon sundry and novel issues of law - - necessitating "case by **case**" judicial review. The FACDL as amicus curiae would suggest to this court that it should consider the looming possibilities of error (as discussed, infra) that will occur if the court **places** its **imprimatur** on serial voir dire.

I.

ARGUMENT

SERIAL VOIR DIRE IS ILLEGAL,
UNCONSTITUTIONAL AND CONSTITUTES AN USURPATION OF THE RULES
OF PROCEDURE PROMULGATED BY THIS COURT

A. What is Serial Voir Dire?

Serial voir dire is the process by which the trial court consolidates multiple-unrelated criminal cases (generally three or more) for voir dire. To effectuate this process, the trial court summons a large venire panel consisting of thirty or more persons. The cases consolidated are often distinct and charge sundry offenses. In many instances, there is a different prosecutor and different defense **counsel** in all **cases**. All parties are present during the jury selection process. The trial court divides **up** and numbers the cases so that counsel for Accused Citizen **A** questions and selects his jury prior to counsel for Accused Citizen B etc. The accuseds in consolidated cases **two**, three, four etc. are ordered and relegated to listening to **the** voir dire examinations in the other **cases** which begin first. The underlying theory of serial

voir dire is that counsel for Citizen A in effect conducts voir dire for Citizen B, C, and D etc. on down the **line**, even though no words are spoken on behalf of the accused who are second, **third**, fourth or fifth in line. The foregoing is a general statement of how serial voir dire is conducted. However, one of the major problems with the process is that absent guidance from this court, individual courts devise their own "rules" in implementing the process.

B. Serial Voir Dire - Violative of Fla.R.Crim.P. 3.300.

Fla.R.Crim.P. **3.300** provides that the accused **may** independently question the venire concerning potential biases and prejudices that they **may** have. Rule **3.300** reads **as** follows:

Rule 3.300. Voir Dire Examination, Oath and Excusing of Member.

(a) **Oath.** The prospective **juror** shall be sworn collectively or individually as the court may decide. The form of oath shall be as follows:

"Do you solemnly swear (or affirm) that you will answer truthfully all questions asked of you as prospective jurors, so help you God?"

If any prospective juror affirms, the clause "so help you **God**" shall be omitted.

(b) **Examination.** The **court** may then examine each prospective juror individually or **may** examine the prospective jurors collectively. Counsel for both the State and defendant **shall** have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The **right of the parties to conduct an examination of each juror orally shall be preserved.**

(c) Prospective Jurors Excused. If, after the examination of any prospective juror, the court is of the opinion that such juror is not qualified to serve as a trial juror, the court shall excuse such juror from the trial of the cause. If, however, the court does not excuse such juror, either party **may** then challenge such juror, as provided by law or these rules. Amended July 18, 1980, effective Jan. 1, 1981 (389 So.2d 610). (emphasis added).

Serial voir dire retards the accused's right to an independent examination of the venire as guaranteed by Rule 3.300. This is particularly poignant for the serial voir dire attorney who addresses the venire last. Subsuming one attorney's questioning into another forestalls the accused's right to independent access and review of the venire. Serial voir dire not only violates the expressed provisions of 3.300, **but** is violative of the spirit and purpose of the rule, since it abridges a citizen's right to an independent and unfettered examination of the venire. This court's consideration and determination of this issue is governed by the following rules of construction:

1. First Tenet/Strict Construction.

Principles of statutory construction are controlling when determining the intent and purpose of a rule of procedure. Rowe v. State, 394 So.2d 1059 (Fla. 1st DCA 1981). It is a fundamental tenet of the law that rules of procedure like statutes must be **strictly construed** and **all doubt** as to their construction must "be resolved in favor of the citizen and against the state." State v. Wershow, 343 So.2d 605, 608 (Fla. 1977).

While we acknowledge a special sympathy for legislation of this nature, which is intended to safeguard the public and insure

honesty and integrity in government, our sympathy cannot be allowed to impair our judgment. This statute is vague beyond redemption. The following language from Judge Johnson's Order meets with our approval:

"The law of Florida is well settled that statutes penal in nature must be **strictly construed according to the letter thereof** (emphasis added). Ex Parte Bailey, [39 Fla. 734,] 23 So. 551 (Fla. 1897); Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962), reh. den. Moreover, such penal statutes are to be strictly construed in favor of **the person against whom the penalty is sought to be imposed** (emphasis in original). Allure Shoe Corp. v. Lymberis, 173 So.2d 702 (Fla. 1965), reh. den. Such stricture thereby places a correlative duty upon our legislators to use **cleat, unambiguous language in** the body of every statute penal in nature. (emphasis added).

State v. Llopis, 257 So.2d 17, 18 (Fla. 1971); Reino v. State, 352 So.2d 853, 860 (Fla. 1977). In construing Rule 3.300, the identical -- strict construction principle applies. **The** question is not whether the trial courts of this state favor a policy recognizing serial voir dire, but whether the process inhibits and restricts the accused's constitutional and procedural rights as embodied within Rule **3.300**.

Access to the courts in appellate review are constitutionally recognized rights and any restrictions thereon should be liberally construed in favor of the right. All related rules should be construed in para materia and if, when so construed, ambiguities develop, these ambiguities should be construed in favor of, and not in restriction of, access to the courts, including the appellate courts.

Lehmann v. Cloniger, 294 So.2d 344, 347 (Fla. 1st DCA 1974) (emphasis added). Rule **3.300** per "the letter thereof" provides for an independent examination of the venire by the accused and based

upon same the trial court erred in compelling Mr. Rock to "participate" in serial voir dire. Llopis at 18.

This court's decision in State v. Chappel, 308 So.2d 1 (Fla. 1975) provides a strong discussion (and analogy) as to the application of this principle of law. The Public Defender of the Sixteenth Judicial Circuit represented several accuseds and attempted to file a written plea of not guilty, waiving his clients' appearance at arraignment. Circuit Judge Chappel took the position that the acceptance of a written plea of not guilty and corresponding waiver of arraignment was discretionary. **The** issue before the court **focused** on the construction of Fla.R.Crim.P. 3.160. This court in construing the rule stated:

By expressed terms of Cr.P.R. 3.160(a), the reading or statement of the charge "may be waived by the defendant" and upon counsel's filing of the written plea of not guilty set forth in that rule, "thereupon arraignment shall be deemed waived" the entire tenor of the rule is to afford certain alternatives to the defendant through his defense counsel and to save his time and that of the court. Whether to enter the written plea or not is therefore an initial determination for the defendant and not the court.

Chappel at 3.

Judge Chappel relied upon the committee notes to the **rule** which suggested that the procedure was discretionary. However, **this court stated that the committee notes were not controlling**, since they had not been incorporated into the rule.

In order to accept respondent's construction of the rules in question, it would be necessary to read into the language of Cr.P.R. 3.160(a) an additional phrase, **and** to have it say, "his counsel may, with the permission of

the court, file a written plea of not guilty...." This it did not do, and there is no compelling State interest shown to justify such a modification of the plain words of **the** rule.

* * *

It would have been a simple matter to insert such a phrase in CR.P.R. 3.160(a) had such a result been intended. The **fact** that no such phrase is present shows that no such result was intended. We therefore view this provision of the rules **as** directory, subject to reasonable procedures applicable to the use of the written not guilty plea.

Chappel at 3.

Like Chappel, the **trial** court in Mr. Rock's case did not **have** the power to modify or create an additional procedure (language) not present in Rule 3.300. The trial courts of this state are bound by the Rules of Procedure promulgated by this court and absent clear directive from same, the **serial** voir dire process is prohibited.

Neither the trial court, nor this court, have the power to amend the procedural rules, for that power belongs exclusively to the Supreme Court of Florida under Section 3, Article V, of the Constitution of Florida, S.S.A.

State v. Bryant, 276 So.2d 184, 186 (Fla. 1st DCA 1973), overruled on other grounds 332 So.2d 706 (Fla. 1976).

2. Second Tenet/Plain and Ordinary Meaning of Words Control.

The plain and ordinary meaning of the words contained within Rule 3.300 govern this issue, If the plain and ordinary words and phrasings contained within this rule show that Mr. **Rock** was entitled to an independent (absent subsuming one

examination into another) examination of the venire, then this court must reverse his case for a new trial.

We find no intelligent way to interpret this **rule** other than to require that an expert witness to be called by the State to testify at the trial be granted access to the defendant. The **plain** language of the rules promulgated by the Supreme Court of Florida are binding upon the trial and appellate courts.

State v. Battle, 302 So.2d 782, 783 (Fla. **3d** DCA 1974); S.E. Fisheries v. Dept. of Nat. Resources, 453 So.2d 1351, 1353 (Fla. 1984); Rowe, supra at 1059; City of Winter Park v. Jones, 392 So.2d **568**, 572 (Fla. 5th DCA 1980).

If it was the intent and desire of **this** court to sanction the serial voir dire process, it would have so stated within the **body** of Rule **3.300**. Until such time (presuming that such a rule of procedure would be constitutional), the accused is entitled to an unfettered and independent "voir dire."

3. Third Tenet - " All Doubt Must be Resolved in Favor of the Citizenry.

The third tier or tenet of construction is that if the Court has any doubt as to the construction of Rule 3.300, then it must resolve the doubt **in** favor of Mr. Rock and find that 3.300 does not provide or allow the imposition of serial voir dire - - the end result being that the trial court erred in compelling Mr. Rock to submit to this process. Reino, supra at 860; Lehmann, supra at **347**.

4. **Fourth Tenet - Subsections of Rule Must Be Read In Parf Materia And Court Must Give Preference To Construction Which Gives Effect To The Rule Over A Construction Which Defeats It.**

Rule 3.300 cannot be read in a vacuum. The rule must be read as a whole and the subsections must be read in pari materia with one another (3)(a) and (3)(b) so that the entire scope and purpose (**spirit**) of the rule is properly discerned. Ebaugh v. State, 623 So.2d 844 (Fla. 5th DCA 1993). The object of this procedural construction task is to give proper effect to a **sensible** construction of the rule over one which would defeat its purpose. Schultz v. State, 361 So.2d 416, 419 (Fla. 1978); Dibble v. Dibble, 377 So.2d 1001, 1003 (Fla. 3d DCA 1979). Only by applying these rules can this court determine the original "intent" of the court (and its committees) in promulgating the rule. A rational and sensible reading of Rule 3.300, readily shows that the underlying purpose of same is to preserve the accused's right to a separate and individual colloquy/examination of the prospective jurors. **Nowhere** within 3.300 is there any intimation that the process of **subsuming** one accused's voir dire examination into a second, third, or even fourth is sanctioned or approved. The **rule** speaks in terms of one party's examination rather than multiple examinations by multiple parties.

5, **Fifth Tenet - Court Cannot Rewrite Rule Absent Compliance With Constitutional Law.**

Decades of jurisprudence stand firm to the principle that the courts **cannot** effectively **amend** a statute or a rule of procedure through construction.

[W]e fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.

One of the strongest reasons for not making this law a nose of wax, to be changed from that which the plain language imports, is the fact that it is a highly penal statute authorizing sentence **of** one convicted under it to a fine of not more than 10,000 pesos, or by imprisonment for not more than two years, or both. If we change it to meet the needs suggested by other laws and fiscal regulations and by the supposed general purpose of the legislation, **we** are creating by construction a vague requirement, and one objectionable in a criminal statute. We are likely thus to trespass on the provision **of** the Bill of Rights that the accused is entitled to demand the nature and cause of the accusation against him, and to violate the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law.

Yu Cong Eng. et al. v. Trinidad, 271 U.S. 500, 46 S.Ct. 619, 623, 70 L.Ed. 1059 (1926) (Opinion delivered by Chief Justice Taft).

This principle was reiterated by this court in State v. Barquet, 262 So.2d 431, 434 (Fla. 1972).

To sum up, for this court to judicially "rewrite" Rule 3.300 to allow for multiple subsumed jury selections - serial voir dire would violate the most fundamental precepts of constitutional law **as** embodied within Article V, § 2(a), Fla. Const. Rule 3.300, does not expressly sanction or contemplate serial voir dire. Therefore, unless this court who promulgates the criminal rules, decides to amend the rule, the trial courts are precluded from its usage;

Article V, Section 2(a), Fla. Const. In this case, only by rewriting and amending the rule through construction can a previously unknown - unapproved of process by created. This is constitutionally impermissible. Bryant, supra at 186; Battle, supra at 783.

B. Serial Voir Dire - Impermissible Consolidation, Rule 3.150 and 3.151, Fla.R.Crim.P.

Serial voir dire constitutes an improper joinder of parties and/or consolidation of **offenses** in violation of Fla.R.Crim.P. 3.150 and/or 3.151,¹ Neither Rule 3.150 or 3.151 contemplates or provides **any** authority for the imposition of the serial voir dire process. Rules 3.150 and 3.151, as promulgated by this court state as follows:

Rule 3.150. Joinder of offenses and defendants

(a) Joinder of offenses. Two or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offense is, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected **acts** or transactions.

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information upon which they are to be tried:

¹ The Fourth District Court of Appeal has **held** that the only significant distinction between joinder and consolidation is that the former is accomplished unilaterally by the State, whereas the latter is accomplished via a party's motion and court order. Sharif v. State, 436 So.2d 420, 422 (Fla, 4th DCA 1983).

(1) When each defendant is charged with accountability for each offense charged;

(2) When each defendant is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to have been committed in furtherance of the conspiracy; or

(3) When, even if conspiracy is not charged and all defendants are not charged in each county, it is alleged that the several offenses charged were part of a common scheme or plan.

Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

Rule 3.151 states:

Rule 3.151. Consolidation of related offenses

(a) For purposes of these rules, two or more offenses are related offenses if they are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions.

(b) Two or more indictments or informations charging related offenses shall be consolidated for trial on a timely motion by a defendant or by the State. The procedure thereafter shall be the same as if the prosecution were under a single indictment or information. Failure to timely move for **consolidation** constitutes a waiver of the right to consolidation.

(c) When a defendant has been tried on a charge of one of two or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion unless a motion by such defendant for **consolidation** of such charges has been previously denied, or unless such defendant has waived his right to **consolidation**, or unless the prosecution has been unable, by due diligence, to obtain sufficient evidence to warrant charging such other offense or offenses.

(d) A defendant may plead guilty or nolo contendere to a charge of one offense on condition that other charges or related offenses be dismissed or that no charges of other related offenses be instituted. Should the court find that such condition cannot be fulfilled, the plea shall be considered withdrawn. Amended Feb. 10., 1977, effective July 1, 1977 (343 So.2d 1247). (emphasis added).

There was no factual or legal justification for joining and consolidating Mr. Rock's case with the other accuseds, who were compelled to participate in serial voir dire.² The question then is whether **consolidating Mr. Rock's case** with the other **two accuseds' cases** for voir dire (rather than the entire trial) violated Rules 3.150 and/or 3.151. The Fourth District Court of Appeal in Sharif v. State, 436 So.2d 420 (Fla. 4th DCA 1983) defined the term **consolidated** to mean "[t]o join together into one whole." Sharif at 422. The following dictionary definitions provide further guidance as to the meaning of the word consolidated as used in Rule 3.151:

Consolidate. In a general sense, to unite or unify into one mass or **body** as to consolidate several small school districts into a large district, or to consolidate various funds. In legislative usage, to consolidate two bills is to unite them into one. The term means something more than to rearrange or redivide.

To make solid or firm; to unite, compress, or pack together and form into a more compact mass, **body**, or system. To cause to become united and extinguished in a superior right or

² It should be noted that at no time **did** the government make **a** motion that Mr. Rock's case - voir dire be consolidated with Mr. Clark's etc.

estate by both becoming vested in the same person. (cite omitted).

See also commingle; consolidation; **joinder**; **merger**.

Black's Law Dictionary, Fifth Edition (1979).

1. To combine into one; unite.
2. To make or become strong, stable, etc.

Webster's New World Dictionary, Modern **Desk** Edition, Simon and Schuster (1979).

Furthermore, the courts have repeatedly recognized that jury examination and selection is a critical stage in a criminal proceeding. Host v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), overruled on other grounds Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653; Salcedo v. State, 497 So.2d 1294, 1295 (Fla. 1st DCA 1986); Lane v. State, 459 So.2d 1145, 1146 (Fla. 3d DCA 1984). Under these circumstances, the combining of Mr. Rock's case with Mr. Clark's etc. during this **critical** stage in the proceedings, constitutes a "consolidation" as connoted within Rules 3.150 and 3.151.

Compliance with the dictates of Rule 3.150 and/or 3.151 is mandated prior to the imposition of serial voir dire. As discussed above, supra pages 4-11, jurisdiction **or** authority to initiate this process cannot be implied or **inferred**. Absent strict compliance with the rules and the tenets of procedural construction, reversal is mandated. Sharif, **supra** at 422; Wilson v. State, 298 So.2d 433, 435 (Fla. 4th DCA 1974).

C. Serial Voir Dire Violates Principles of Due Process.

It is axiomatic that the due process protections granted our citizenry are applicable to the states through the Fourteenth Amendment to the United States Constitution. Although the United States Supreme Court has never attempted to define with precision the term due process, it is beyond question that due process encompasses traditional notions of fair play and fundamental fairness. International Shoe Company v. Washinston, 326 U.S. 310, 66 S.Ct. 154, 158, 90 L.Ed. 95, (1945). There is no set scientific or mathematical formula for determining whether a particular case violates a citizen's due process protections. Gibbs v. Burke, 337 U.S. 773, 69 S.Ct. 1247, 1250-1251, 93 L.Ed. 1686 (1949). Although due process is an elusive principle, not subject to clear definition, the United States Supreme Court has repeatedly held that an act or process of government that shocks the conscience or violates society's universal sense of justice is constitutionally infirm. Galvan v. Press, 347 U.S. 522, 94 S.Ct. 737, 745, 90 L.Ed. 911 (1954); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 208-210, 96 L.Ed. 183 (1952). It is against this backdrop that this court must determine whether the serial voir dire process initiated by the trial court below, violated Mr. Rock's constitutional guarantee to due process of law.

1. Improper Time Constrictions.

The appellate courts have consistently held that the trial courts cannot unduly restrict the time that the accused has to address the venire. Williams v. State, 424 So.2d 148 (Fla. 5th

DCA 1982). The accused is entitled to ample time and opportunity to converse with the venire so that a meaningful **examination of** the venire panel is assured. A **reasonable** voir dire is guaranteed since the purpose of same is to obtain a fair and impartial jury. Moody v. State, 418 So.2d 989, 983 (Fla. 1982); Pineda v. State, 571 So.2d 105, 106 (Fla. 3d DCA 1990); Williams, supra at 149; Barker v. Randolph, 239 So.2d 110, 112 (Fla. 1st DCA 1970); Gibbs v. State, 193 So.2d 460, 462 (Fla. 2d DCA 1967). Serial voir dire violates this rule by "subsuming" counsel's examination into prior counsel's inquiry. The fact that the court continually admonishes counsel exacerbates the situation and reinforces to the venire that counsel's questioning is unimportant and need not be given any sincere consideration. **As** noted in Mr. Rock's case, the trial court on several occasions, admonished the attorneys that the process was taking too long and they should hurry up.

The Court: **And** Mr. Bateh, keep in mind we've got **two** more **juries** to go after this one so let's move along.

(R. 41) (emphasis added).

The Court: Let's move **along**, Mr. Bateh, we've selected three juries by 1:15, let's move **along**.

(R. 56) (emphasis added).

The Court: Alright. Let's move along.

(R. 83).

2. Confusion/Intermingling of Theories, Facts and Cases.

Serial voir dire is deleterious to a fair trial since the venire panel is compelled to absorb and listen to diverse

questioning concerning various **theories** and **elements of different cases**. The venire cannot be expected to fully appreciate and absorb the points and questions propounded by counsel when they are dealing with a multitude of different issues and **facts**. Due process of law is violated by serial voir dire since the venire is deluged with so much diverse information that counsel cannot adequately delve into any bias or prejudice that a potential juror may have. Scientific studies show and confirm that this proposition is correct. See The Psychology of Vigilance; Social Information Processing and Survey Methodology; Varieties of Attention; and The Psychometrics of Fatigue which are attached hereto as **FACDL's Exhibit A, B, and C,** and D respectively.

3. Desensitization of the Venire.

An assembly line process, like serial voir dire, **taints** the **jury** in that it implies that the system tries its citizens "en masse." Such a process takes away the solemnity, uniqueness and respect that our citizens/the venire have for the system. In essence, it denies the citizen accused a right to a fair trial by his peers. Selecting juries **in bulk** desensitizes them to questions posed as well as the issues presented. Without a meaningful examination - - voir dire becomes meaningless. See scientific studies, supra, Appendix A, B, C and D respectively.

4. Exhaustion of the Panel/Attention Span.

In virtually every **serial** voir dire case, the process is either **summary** or **lengthy**. If it **is** summary in nature, then the accused's right to a meaningful examination is thwarted

and reversal is mandated. See I, C(1), supra at 15-16. In the latter situation where the process is extremely lengthy, the questioning results in physically and mentally exhausting the venire. Serial voir dire severely diminishes the effectiveness of voir dire since a "tired" venireman is not willing or able to substantively communicate with counsel. As previously stated, scientific studies show that the length of questioning thoroughly diminishes a person's attention span. The result of this is to deny the accused a **meaningful examination** of the panel. It could be argued that if the jury was exhausted after the voir dire examination, then the jury would never be **able** to comprehend or focus on the facts of the trial once they were selected. This we know does not (always) occur. However, the intent and purpose of voir dire is to determine if a venireman can be a fair and impartial juror. Voir dire is not specifically predicated upon the recitation of factual matters, as is the case with a trial. The emphasis of voir dire lies in discussing fundamental issues of due process and delving into any preconceived bias that a venireman might have in a case.

5. Picked Over Jurors and Unduly Favors Government.

Mr. Rock selected his jury second. Certainly, the most desirable jurors had already been selected for the first case. The result of this was that counsel for Mr. **Rock** was faced with a smaller panel of jurors, the "cream" at which had already been selected for the previous case. This situation is exacerbated when counsel is faced with a situation where the accused selects his

jury last. This bottom of the barrel mentality which serial voir dire **emphasizes** should not be sanctioned by the courts. Furthermore, in Mr. Rock's case, the government had three agents in the three cases at hand, In these cases, the government's attorneys confined their questioning within the same legal **and** philosophical framework. The prosecutors were all agents of the same entity - - the government of the State of Florida. On the other hand, the two defense attorneys were not associated and did not work under the auspices of one agency. Mr. Rock's counsel, who was also counsel for Mr. Clark, certainly was constricted and curtailed in her questioning, since the thrust of serial voir dire is to minimize individuality and independent questioning of the venire. The underlying purpose and rule of "multiple selections" is that counsel must not repeat or requestion the prospective jury on any issue. He or she must rely on both predecessor's style and substance in questioning the venire, Once again, absent legislative enactment **or** an amendment of the procedural rules by this court, this process is prohibited.

D. Down The Rabbit Hole Or Additional Challenges and Pitfalls of Serial Voir Dire.

1. Equal Protection/Racial Stigma.

It is a **fact** of the criminal justice system, that a greater percentage of the accuseds that come before the court are of African-American descent, principally young, **black** males. In this case, both Mr. Clark and **Mr. Rock** are black males. The question arises as to what issues will arise with serial voir dire, where the majority or all of the **accuseds** - - (serial voir dire

participants) are black. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Florida Constitution guarantee the accused equal protection under the laws. The effect of placing multiple accuseds, of a minority race, before the venire, is to reinforce (to the venire) the stereotype that minorities/blacks commit more crimes than whites. It is a reasonable assertion, that the white populace within this country, particularly in the "South" believes that **blacks** commit more crimes than whites. This mind set is strengthened by studies which show that a growing number **and** percentage of America's young, black youths are being incarcerated in staggering numbers. See study entitled Hobbling a Generation: Young African American Males in D.C.'s Criminal Justice System, Jerome C. Miller, National Center on Institutions and Alternatives, April 17, 1992, attached as FACDL's Appendix E. A person's race should not be a consideration in the process. Serial voir dire has the inherent capability of violating the accused's right to a fair trial, equal protection and due process of law, where a minority group is seated before the venire en masse, hence cementing a negative stereotype. These procedure-tactics, no matter how subtle, should not become a focus in voir dire. It is unreasonable to believe that a person, no matter how objective or sincere, would not be adversely affected, either consciously or subconsciously by this inherently discriminatory process.

2. Potentially Discriminatory Practice - Peremptory Challenges/Spirit of State v. Neil and Batson v. Kentucky Is Violated By Compelling The Accused To Submit and Participate In Serial Voir Dire.

The United States Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), stands for the proposition that the government or the accused cannot illegally and discriminatorily exercise a peremptory challenge to strike a minority member from the venire. The Batson premise has been followed and expanded by this court in State v. Slappy, 522 So.2d 18 (Fla. 1988); State v. Neil, 457 So.2d 481 (Fla. 1984); and their Progeny. Due to burgeoning caseload constrictions, the trial courts have now implemented a "new" jury selection process that violates the spirit of this rule of law. Certainly, when a panel of prospective jurors contains several minority members, the accused should have a reasonable opportunity to choose or select those parties to be on his jury. The constitutional flaw in the serial voir dire process is that the second or third party to select his jury, is foreclosed from selecting these minority members. This "foreclosure" does not come about through the illegal striking of minority venire members by the government, but on the other hand, comes about through **their** selection by the accuseds or the government who select their jury first. This constitutional impediment should not be sanctioned simply because the courts are feeling the pressures of a burgeoning docket. All new management procedures, whether they be serial voir dire or others, come at **the** risk of violating an accuseds procedural and constitutional rights. This is the **case** with serial

voir dire. Although, originally the trial courts may have felt that they were simply streamlining the system and "saving time", the net result of this process is that it is and has created a new set of complex legal issues and challenges with a corresponding number of cases which must be decided and answered. In Mr. Rock's case, although there were several **black** veniremen present on the panel subsequent to jury selection on the first case, these black individuals were **rotated** and placed at the end or back of his panel. This "rotation" foreclosed him from reaching **and** placing these individuals on his jury. Based upon same, reversible error occurred in Mr. Rock's case and due to the seriousness of this issue and its effect upon the constitutional rights of Florida's citizenry, this court should step forward and determine the parameters of this issue in accordance with the spirit of Batson **and** Neil.

CONCLUSION

Based upon the arguments and authorities cited herein, the District Court's decision affirming Mr. Rock's conviction should be reversed and Mr. Rock's case should be remanded to the trial court with instructions to grant him a new trial.

Respectfully submitted this 28th day of February, 1994,
Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that a true copy of the foregoing has been mailed, first class postage prepaid, to **Bradley R. Bischoff**, Assistant Attorney General, **The Capitol**, Tallahassee, FL 32399-1050; **Nada M. Carey**, Assistant Public Defender, Leon County Courthouse, **301 S. Monroe Street**, Suite 401, Tallahassee, FL 32301; with the original **and seven copies** of the foregoing delivered by U.S. Mail to **Sid J. White**, Clerk, The Supreme Court of Florida, Supreme Court Building, **500 South Duval Street**, Tallahassee, FL **32399-1925**.



STEVEN G. MASON